

**PATENT**  
**Application 10/664,754**  
**Attorney Docket 2002P15652US01 (1009-039)**

**REMARKS**

Applicant respectfully thanks the Examiner for the consideration provided to this application, and respectfully requests reconsideration of this application.

Claims 1-25 are now pending in this application. Each of claims 1, 19, and 20 is in independent form.

**I. The Anticipation Rejections**

Each of claims 1-12 and 19-20 was rejected as anticipated, and thus unpatentable, under 35 U.S.C. 102(b). In support of the rejection, various portions of U.S. Patent 6,282,455 ("Engdahl") were applied. These rejections are respectfully traversed.

**A. Legal Standards**

To establish a *prima facie* case of express anticipation, the "invention must have been known to the art in the detail of the claim; that is, all of the elements and limitations of the claim must be shown in a single prior art reference, arranged as in the claim". *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1383, 58 USPQ2d 1286, 1291 (Fed. Cir. 2001); *See also*, MPEP 2131. The single reference must describe the claimed subject matter "with sufficient clarity and detail to establish that the subject matter existed in the prior art and that its existence was recognized by persons of ordinary skill in the field of the invention". *Crown Operations Int'l, LTD v. Solutia Inc.*, 289 F.3d 1367, 1375, 62 USPQ2d 1917, 1921 (Fed. Cir. 2002). Moreover, the prior art reference must be sufficient to enable one with ordinary skill in the art to practice the claimed invention. *In re Borst*, 345 F.2d 851, 855, 145 USPQ 554, 557 (CCPA 1965), *cert. denied*, 382 U.S. 973 (1966); *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1354, 65 USPQ2d 1385, 1416 (Fed. Cir. 2003) ("A claimed invention cannot be anticipated by a prior art reference if the allegedly anticipatory disclosures cited as prior art are not enabled.")

The USPTO "has the initial duty of supplying the factual basis for its rejection." *In re Warner*, 379 F.2d 1011, 154 USPQ 173, 178 (CCPA 1967).

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**B. Analysis**

Engdahl fails to establish a *prima facie* case of anticipation.

Specifically, each of claims 1, and 19, from one of which each of claims 2-12 ultimately depends, states, *inter alia*, yet no substantial evidence has been presented that the applied portions of Engdahl teach, “responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically **adjusting a position** of said parent node”. Claim 20 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of Engdahl teach, “a processor adapted to, responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically **adjust a position of said parent node**”.

The present Office Action alleges, at least at Page 5, that this claimed subject matter is taught as:

...responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node (‘...is on top of another object...’ col. 8, lines 25-26), automatically adjusting a position of said parent node (‘... parent node connects to the child node’s properties...’ col. 8, lines 29-30).

Yet the present Office Action fails to provide evidence that the applied portion of Engdahl that states, at col. 8, lines 29-30, “node connects to the child node’s properties” teaches “automatically” adjusting a “position of said parent node”. Instead, regarding the “properties” referenced in col. 8, lines 29-30, Engdahl allegedly states, at col. 8, lines 30-51 (emphasis added):

[f]or example, the meter tool 68 has an input argument accepting a physical quantity output type that may be a physical quantity reflected in data of a property associated with another object 64. Placement of the meter tool 68 on a particular stationary object 64 **provides a reading of physical quantity I/O data in quantitative form that is part of the properties of the node of the stationary object 64**. An example stationary object would be a terminal block object 109 providing a visual terminal for electrical values and having a voltage property. As a second example, the communications port object 91 may have **communications data as a property readable by the meter tool 68**. The identification of objects

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that should have their arguments connected is by parent child relationships of the scene graph 56. **All properties of the nodes, representing data associated with the nodes, may be grouped according to data type** so that such linkages may be established automatically. Thus the meter tool methods indicate the type of data they may accept (e.g., voltage, temperature, logic) and when connected to another node as a child may search for relevant data types and automatically connect to these devices by reading the properties associated with the data types.

The “properties” referenced by the applied portion of Engdahl appear to be related to providing a **“reading of physical quantity I/O data in quantitative form”**, **“communications data”**, or **“data associated with the nodes”**. The present Office Action presents no evidence that any “properties” referenced by the applied portions of Engdahl teach, “automatically” adjusting a **“position of said parent node”**.

In response to this previously presented and persuasive argument, the present Office Action, at Pages 14-15 alleges that another portion of Engdahl at col. 6, lines 40-45 as somehow teaching this claimed subject matter. Yet this applied portion of Engdahl merely states:

Generally each node includes the property of visibility and thus its associated object may become invisible or transparent allowing this nesting of objects in other objects to be properly displayed on the visual display 22 and the display to be simplified when all components to nodes need not be displayed.

No evidence is of record that:

- i. merely a “objects by “property of visibility” teaches any adjustment of “a position of a parent node”; or
- ii. that “allowing this nesting of objects in other objects to be properly displayed on the visual display” teaches any adjustment of “a position of a parent node”.

Thus, the present Office Action presents no substantial evidence that the applied portions of Engdahl teach, “responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically **adjusting a position** of said parent node”.

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In a Preliminary Amendment filed 30 January 2008, a Declaration was filed under 37 C.F.R. § 1.132 by George Muenzel, an employee of Siemens Corporation (assignee of the present application), and one skilled in the art of industrial computer applications engineering as of 23 September 2002, the priority date claimed by the present application. Paragraphs 15-28 of Mr. Muenzel's Declaration provide evidence that one having ordinary skill in the art would not have found that the applied portions of Engdahl teach, "responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically adjusting a position of said parent node" as claimed by each of independent claims 1 and 19.

Paragraphs 15-29 of Mr. Muenzel's Declaration provide evidence that one having ordinary skill in the art would not have found, as of 23 September 2002, that the applied portions of Engdahl would have enabled one having ordinary skill in the art to practice the claimed subject matter of, "responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically adjusting a position of said parent node", as claimed by each of independent claims 1 and 19, without undue experimentation.

Paragraphs 15-30 of Mr. Muenzel's Declaration provide evidence that one having ordinary skill in the art would not have found that the applied portions of Engdahl teach, "a processor adapted to, responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically adjust a position of said parent node" as claimed by independent claim 20.

Paragraphs 15-31 of Mr. Muenzel's Declaration provide evidence that one having ordinary skill in the art would not have found, as of 23 September 2002, that the applied portions of Engdahl would have enabled one having ordinary skill in the art to practice the claimed subject matter of, "a processor adapted to, responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically adjust a position of said parent node", as claimed by independent claim 20, without undue experimentation.

The present Office Action purports to respond to the evidence of Mr. Muenzel's Declaration, by asserting at Page 13:

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[t]he substance of the declaration offers several factually determinations based on what one of ordinary skill in the art would have found, but fails to set forth any facts to support the conclusory determination(s) about the level of ordinary skill was.

Notably, the present Office Action fails to provide any legal authority for these assertions. Specifically, there is no legal requirement that a Declarant under 37 C.F.R. § 1.132 explicitly evidence the level of skill of one having ordinary skill in the art. Instead, under at least MPEP 2141.03 and *Environmental Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 218 USPQ 865 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984), a proper Office Action must evidence the level of skill of one having ordinary skill in the art. The present Office Action fails to fulfill this requirement.

The present Office Action further asserts at Page 13:

[t]he evidence contained in the declaration was also given evidentiary weight. However, in view of the foregoing, when all of the evidence is considered, the totality of the rebuttal evidence fails to outweigh the evidence used to support the original rejections.

Applicant respectfully traverses this assertion as being erroneous. The present Office Action presents absolutely no evidence that one having ordinary skill in the art would have found the claimed subject matter of "responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically adjust[ing] a position of said parent node" to be taught or enabled by the applied portions of the relied-upon references. The evidence of Mr. Muenzel's Declaration cannot possibly be "outweigh[ed]" by what amounts to no evidence whatsoever.

For at least this reason, it is respectfully submitted that the rejection of claims 1, 19, and 20 is unsupported by Engdahl and should be withdrawn. Also, the rejection of claims 2-12, each ultimately depending from independent claim, is unsupported by Engdahl and also should be withdrawn.

## **II. The Obviousness Rejections**

Each of claims 13-18, and 21-25 was rejected under 35 U.S.C. 103(a) as being obvious,

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and thus unpatentable, over various combinations of U.S. Patent 6,282,455 ("Engdahl"), U.S. Patent 2004/0021679 ("Chapman"), and/or U.S. Patent 5,911,145 ("Arora"). Each of these rejections is respectfully traversed.

**A. Legal Standards**

**1. Overview of *Prima Facie* Criteria for an Obviousness Rejection**

The Patent Act, namely, 35 U.S.C. 103, forbids issuance of a patent when "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art."

Relatively recently, in *KSR International Co. v. Teleflex, Inc.*, 550 U.S. \_\_\_, 127 S. Ct. 1727, 2007 U.S. LEXIS 4745 (2007), the Supreme Court interpreted this law while highlighting the typical invention process. "Inventions usually rely upon building blocks long since uncovered, and claimed discoveries **almost necessarily will be combinations** of what, in some sense, is already known" (emphasis added). Yet, to properly apply §103, the Court recognized the need to filter, via obviousness analyses, true inventions from mere ordinary technological advances. "Granting patent protection to advances that **would occur in the ordinary course** without real innovation retards progress and may, in the case of patents combining previously known elements, deprive prior inventions of their value or utility" (emphasis added).

In *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), the Supreme Court established factors regarding the factual inquiry required to establish obviousness. The factors include:

1. determining the scope and contents of the prior art;
2. ascertaining differences between the prior art and the claims at issue;
3. resolving the level of ordinary skill in the pertinent art; and
4. considering objective evidence indicating obviousness or nonobviousness.

Regarding proposed combinations of prior art, *KSR* clarified that the "[t]he question is not whether the combination was obvious to the patentee but whether the combination was obvious to a person with ordinary skill in the art". Thus, in determining obviousness, both *KSR* and *Graham* warned against a "temptation to read into the prior art the teachings of the invention

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in issue” and instruct to “guard against slipping into the use of hindsight”.

*KSR* further warned, “a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art”. The Federal Circuit has held that “[w]hen there is a design need or market pressure to solve a problem”, obviousness is not supported unless “a finite, and in the context of the art, small or easily traversed, number of options” “would convince an ordinarily skilled artisan of obviousness”. *Ortho-McNeil Pharmaceutical Inc. v. Mylan Laboratories Inc.*, 520 F.3d 1358 (Fed. Cir. 2008).

To guard against hindsight, *KSR* explained the “import[ance]” of “identify[ing] a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does” (emphasis added). That is, “rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness” (quoting *In re Kahn*, 441 F. 3d 977, 988 (Fed. Cir. 2006) (emphasis added)). Thus, “[t]o facilitate review, this analysis should be made explicit”.

Explaining the need for “a reason that would have prompted a person of ordinary skill”, *KSR* further taught that “if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill” (emphasis added). Further exploring this mandate, the Federal Circuit has recently recognized that “knowledge of a problem and motivation to solve it are entirely different from motivation to combine particular references”. *Innogenetics v. Abbott Laboratories* (Fed. Cir. 2007-1145) (8 January 2008).

Thus, according to the Supreme Court, a proper obviousness rejection must “identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does” and must present substantial evidence that one of ordinary skill **WOULD** recognize that alleged reason for making the particular claimed combination. It follows that if the alleged reason for making the particular combination of features is not evidenced to be art-recognized, then that reason **MUST BE** based on hindsight.

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In addition to establishing a proper reason to combine, a proper obviousness rejection must clearly identify proposed reference(s) that:

1. are pertinent;
2. provide a reasonable expectation of success; and
3. teach... all the claim limitations

See MPEP 2143; MPEP 2143.03, *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991); and additional citations *infra*.

Consistent with other patentability rejections, to establish a *prima facie* case of obviousness, substantial evidence must be provided that fulfills the mandates of the applicable law. The "Patent Office has the initial duty of supplying the factual basis for its rejection." *In re Warner*, 379 F.2d 1011, 154 USPQ 173, 178 (CCPA 1967), *cert. denied*, 389 U.S. 1057, *reh'g denied*, 390 U.S. 1000 (1968). "It may not... resort to speculation, unfounded assumptions or hindsight reconstruction to supply deficiencies in its factual basis". *Id.*

It is legal error to "substitute[] supposed *per se* rules for the particularized inquiry required by section 103. It necessarily produces erroneous results." *See, In re Ochiai*, 71 F.3d 1565, 1571, 37 USPQ2d 1127, 1132-33 (Fed. Cir. 1998); *In re Wright*, 343 F.2d 761, 769-770, 145 USPQ 182, 190 (CCPA 1965).

"Once the examiner... carries the burden of making out a *prima facie* case of unpatentability, 'the burden of coming forward with evidence or argument shifts to the applicant.'" *In re Alton*, 76 F.3d 1168, 37 USPQ2d 1578 (Fed. Cir. 1996) (*quoting In re Oetiker*, 977 F.2d at 1445, 24 USPQ2d at 1444).

## 2. All Words in a Claim Must Be Considered

"To establish *prima facie* obviousness..., '[a]ll words in a claim must be considered'". MPEP 2143.03, *quoting In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970); *see also, In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974); *In re Wilder*, 429 F.2d 447, 166 USPQ 545, 548 (CCPA 1970); *In re Angstadt*, 537 F.2d 498, 190 USPQ 214, 217 (CCPA 1976); *In re Geerdes*, 491 F.2d 1260, 180 USPQ 789, 791 (CCPA 1974).



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**3. Unfounded Assertions of Knowledge**

Deficiencies of the cited references can not be remedied by general conclusions about what is basic knowledge or common sense to one of ordinary skill in the art. *In re Zurko*, 258 F.3d 1379, 1385-86 (Fed. Cir. 2001). An assessment of basic knowledge and common sense that is not based on any evidence in the record lacks substantial evidence support. *Id.* That is, such unfounded assertions are not permissible substitutes for evidence. *See, In re Lee*, 277 F.3d 1338, 1435, 61 USPQ2d 1430, 1435 (Fed. Cir. 2002).

**4. Determination of the Level of Skill**

Under *Graham*, the required "factual determinations underpinning the legal conclusion of obviousness include 1) the scope and content of the prior art, 2) the level of ordinary skill in the art, 3) the differences between the claimed invention and the prior art, and 4) evidence of secondary factors, also known as objective indicia of non-obviousness." *Eisai Co. Ltd. v. Dr. Reddy's Laboratories, Inc.*, 2008 WL 2791884 (Fed. Cir. 2008), *citing Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). "The importance of resolving the level of ordinary skill in the art lies in the necessity of maintaining objectivity in the obviousness inquiry." *Id.* Thus, the "examiner must ascertain what would have been obvious to one of ordinary skill in the art at the time the invention was made, and 'not to the inventor, a judge, a layman, those skilled in remote arts, or to geniuses in the art at hand'." MPEP 2141.03, *quoting Environmental Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 218 USPQ 865 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

**5. Next Office Action**

If an Office Action fails to set forth sufficient facts to provide a *prima facie* basis for the rejections, any future rejection based on the applied reference will necessarily be factually based on an entirely different portion of that reference, and thus will be legally defined as a "new grounds of rejection." Consequently, any Office Action containing such rejection can not properly be made final. *See, In re Wiechert*, 152 USPQ 247, 251-52 (CCPA 1967) (defining "new ground of rejection" and requiring that "when a rejection is factually based on an entirely different portion of an existing reference the appellant should be afforded an opportunity to make

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a showing of unobviousness vis-a-vis such portion of the reference”), and *In re Warner*, 379 F.2d 1011, 154 USPQ 173, 178 (CCPA 1967) (the USPTO “has the initial duty of supplying the factual basis for its rejection”).

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**B. Analysis**

**1. Claims 13-18**

As demonstrated, *supra*, claim 1, from which each of claims 13-18 ultimately depends, states, *inter alia*, yet no substantial evidence has been presented that the applied portions of Engdahl teach, “responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically **adjusting a position** of said parent node”.

The applied portions of the other applied references fail to cure at least these deficiencies of the applied portions of Engdahl.

Also, as indicated, *supra*, paragraphs 15-28 of Mr. Muenzel’s Declaration provide evidence that one having ordinary skill in the art would not have found that the applied portions of Engdahl teach, “responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically adjusting a position of said parent node” as claimed by independent claim 1.

Paragraphs 15-29 of Mr. Muenzel’s Declaration provide evidence that one having ordinary skill in the art would not have found, as of 23 September 2002, that the applied portions of Engdahl would have enabled one having ordinary skill in the art to practice the claimed subject matter of, “responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically adjusting a position of said parent node”, as claimed by independent claim 1, without undue experimentation.

Thus, even if there were proper evidence of obviousness presented in the Office Action (an assumption that is respectfully traversed), and even if there were a reasonable expectation of success in combining or modifying the applied portions of the references relied upon in the Office Action (another assumption that is respectfully traversed), the applied portions of the references relied upon in the Office Action, **as attempted to be modified and/or combined**, still do not expressly or inherently teach every limitation of the independent claims, and

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consequently fail to establish a *prima facie* case of obviousness. Consequently, for at least the reasons mentioned above, reconsideration and withdrawal of these rejections is respectfully requested.

Applicant respectfully notes that the present Office Action fails to evidence the scope and contents of the prior art as required under *Graham*. The present Office Action fails to even identify what "the pertinent art" is. Moreover, the present Office Action fails to evidence the level of ordinary skill in the pertinent art.

For at least these reasons, Applicant respectfully requests reconsideration and withdrawal of each rejection of each of claims 13-18, each of which ultimately depends from independent claim 1.

**2. Claim 21**

Claim 21 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of the relied-upon references teach, a "wherein the arrangement is rendered responsive to a **user-specified inter-generational spacing between nodes**".

Thus, even if there were proper evidence of obviousness presented in the Office Action (an assumption that is respectfully traversed), and even if there were a reasonable expectation of success in combining or modifying the applied portions of the references relied upon in the Office Action (another assumption that is respectfully traversed), the applied portions of the references relied upon in the Office Action, **as attempted to be modified and/or combined**, still do not expressly or inherently teach every limitation of the claims, and consequently fail to establish a *prima facie* case of obviousness. Consequently, for at least the reasons mentioned above, reconsideration and withdrawal of these rejections is respectfully requested.

For at least these reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claim 21.

**3. Claim 22**

Claim 22 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of the relied-upon references teach, a "wherein the arrangement is rendered responsive to a **user-specified intra-generational spacing between nodes**".

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Thus, even if there were proper evidence of obviousness presented in the Office Action (an assumption that is respectfully traversed), and even if there were a reasonable expectation of success in combining or modifying the applied portions of the references relied upon in the Office Action (another assumption that is respectfully traversed), the applied portions of the references relied upon in the Office Action, **as attempted to be modified and/or combined**, still do not expressly or inherently teach every limitation of the claims, and consequently fail to establish a *prima facie* case of obviousness. Consequently, for at least the reasons mentioned above, reconsideration and withdrawal of these rejections is respectfully requested.

For at least these reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claim 22.

**4. Claim 23**

Claim 23 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of the relied-upon references teach, a “wherein the arrangement is rendered responsive to a **user-specified node wall thickness**”.

Thus, even if there were proper evidence of obviousness presented in the Office Action (an assumption that is respectfully traversed), and even if there were a reasonable expectation of success in combining or modifying the applied portions of the references relied upon in the Office Action (another assumption that is respectfully traversed), the applied portions of the references relied upon in the Office Action, **as attempted to be modified and/or combined**, still do not expressly or inherently teach every limitation of the claims, and consequently fail to establish a *prima facie* case of obviousness. Consequently, for at least the reasons mentioned above, reconsideration and withdrawal of these rejections is respectfully requested.

For at least these reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claim 23.

**5. Claim 24**

Claim 24 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of the relied-upon references teach, a “wherein the arrangement is rendered responsive to a **predetermined upper and lower limit** of inter-generational spacing between nodes”.

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Thus, even if there were proper evidence of obviousness presented in the Office Action (an assumption that is respectfully traversed), and even if there were a reasonable expectation of success in combining or modifying the applied portions of the references relied upon in the Office Action (another assumption that is respectfully traversed), the applied portions of the references relied upon in the Office Action, **as attempted to be modified and/or combined**, still do not expressly or inherently teach every limitation of the claims, and consequently fail to establish a *prima facie* case of obviousness. Consequently, for at least the reasons mentioned above, reconsideration and withdrawal of these rejections is respectfully requested.

For at least these reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claim 24.

**6. Claim 25**

Claim 25 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of the relied-upon references teach, a “wherein the arrangement is rendered responsive to a **predetermined upper and lower limit** of intra-generational spacing between nodes”.

Thus, even if there were proper evidence of obviousness presented in the Office Action (an assumption that is respectfully traversed), and even if there were a reasonable expectation of success in combining or modifying the applied portions of the references relied upon in the Office Action (another assumption that is respectfully traversed), the applied portions of the references relied upon in the Office Action, **as attempted to be modified and/or combined**, still do not expressly or inherently teach every limitation of the claims, and consequently fail to establish a *prima facie* case of obviousness. Consequently, for at least the reasons mentioned above, reconsideration and withdrawal of these rejections is respectfully requested.

For at least these reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claim 25.

**III. Discussion Regarding *In re Wiechert***

Regarding Applicant’s citation of *In re Wiechert*, the present Office Action asserts, at Page 16 (internal citations omitted):

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Applicant has relies on *In re Wiechert* however, Applicant has failed to make any showing of unexpected properties to support patentability.

Applicant respectfully traverses this assertion as a misapprehension of *In re Wiechert*.

The opinion of Judge Rich in *In re Wiechert* stated (emphasis added):

[i]t seems basic to the concept of procedural due process that an applicant at least be informed of the broad statutory basis for rejecting his claims, so that he may determine what the issues are on which he can or should produce evidence.

In the present case, the rejection first advanced by the board left appellant without an opportunity to make a showing of unobviousness. Appellant requests that we provide such an opportunity by remanding the case to the board.

**An applicant's attention and response are naturally focused on that portion of the reference which is specifically pointed out by the examiner. More important, where, as here, the appellant depends on a showing of unexpected properties to support patentability, the comparison which results in a conclusion of unexpected properties cannot practically be made for all of the compounds which might be mentioned in a particular reference. Under such circumstances, we conclude that when a rejection is factually based on an entirely different portion of an existing reference the appellant should be afforded an opportunity to make a showing of unobviousness vis-à-vis such portion of the reference.**

*In re Wiechert*, 370 F.2d 927, 933 (C.C.P.A., 1967). This portion of the opinion of *In re Wiechert* does not limit "circumstances" that an "appellant should be afforded an opportunity to make a showing of unobviousness" to "only when the applicant depends on showing of unexpected properties to support patentability". Instead, the discussion regarding the appellant depending on "a showing of unexpected properties to support patentability" is presented as an additional factor justifying remand. Read in its entirety, and contemplated logically, the opinion indicates that if a different portion of a relied-upon reference is first applied in rejecting claims, asserting finality in that Office Action deprives an applicant of procedural due process since no opportunity is provided for the applicant to determine "what the issues are on which he can or should produce evidence". Applicant respectfully traverses the apparent attempt of the present

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Office Action to improperly limit the holding of *In re Weichert* and potentially deprive Applicant of procedural due process regarding the present application.

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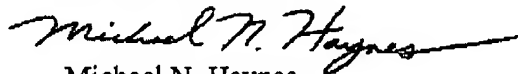
**CONCLUSION**

It is respectfully submitted that the application is in clear condition for allowance. Reconsideration, withdrawal of all grounds of rejection, and issuance of a Notice of Allowance are earnestly solicited.

The Office is hereby authorized to charge any additional fees or credit any overpayments under 37 C.F.R. 1.16 or 1.17 to Deposit Account 50-2504. The Examiner is invited to contact the undersigned at 434-972-9988 to discuss any matter regarding this application.

Respectfully submitted,

Michael Haynes PLC



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